

SERVED: December 7, 1994

NTSB Order No. EA-4281

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 10th day of November, 1994

_____	)	
DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-13382
v.	)	
	)	
JOSEPH R. KRUEGER,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on April 19, 1994, following an evidentiary hearing.<sup>1</sup> The law judge affirmed in part and reversed in part an order of the Administrator suspending respondent's private pilot certificate, on finding that respondent had violated 14 C.F.R. 91.111(a),

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<sup>1</sup>The initial decision, an excerpt from the hearing transcript, is attached.

91.130(c), and 91.13(a). The law judge declined to find violations of §§ 91.111(b) or 91.113(f), as alleged by the Administrator.<sup>2</sup> In light of his dismissal of part of the complaint, the law judge reduced the Administrator's proposed 180-day suspension to a 90-day suspension. We grant the appeal.<sup>3</sup>

Respondent has admitted to being the pilot in command of an AMTR Long-Eze on a flight in the vicinity of Madison, WI, on October 3, 1992. According to the testimony of the pilot and flight nurse of an emergency medical helicopter enroute to pick

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<sup>2</sup>§ 91.111(a) and (b) read:

(a) No person may operate an aircraft so close to another aircraft so as to create a collision hazard.

(b) No person may operate an aircraft in formation flight except by arrangement with the pilot in command of each aircraft in the formation.

§ 91.113(f), reads:

(f) Overtaking. Each aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear.

§ 91.130(c), as pertinent, reads:

(c) Communications. Each person operating an aircraft in Class C airspace must meet the following two-way radio communications requirements:

(1) Arrival or through flight. Each person must establish two-way radio communications with the ATC [air traffic control] facility . . . providing air traffic services prior to entering that airspace and thereafter maintain those communications while within that airspace.

§ 91.13(a) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>Respondent did not reply to the Administrator's appeal.

up a passenger in that area, respondent approached the helicopter and proceeded to follow it, on a parallel course, for at least 10 minutes. The flight nurse (on whose testimony the law judge placed great weight because he was assigned by the pilot to keep an eye on the aircraft), stated that respondent's aircraft remained within a few hundred feet for most of this time, tracking the helicopter, despite the pilot's repeated attempts to evade it.<sup>4</sup> Respondent's aircraft suddenly ascended over the helicopter, within 100-200 feet, and took off to the southeast. Tr. at 20, 38. ATC tracked the aircraft to its landing, where it was identified.

As noted, respondent admitted being in the area. However, he testified that he merely crossed the path of the helicopter traveling southeast, with the helicopter traveling northeast, and that he was not in Class C airspace. Tr. at 79.<sup>5</sup>

The law judge found that respondent had entered Class C airspace but had failed to establish two-way radio contact with ATC, and that he had carelessly created a collision hazard by flying too close to the helicopter.<sup>6</sup> The Administrator appeals

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<sup>4</sup>The pilot testified that the aircraft was 100-150 feet away (Tr. at 19) and 150-200 feet away (*id.* at 21). His letter to the FAA at the time of the incident spoke of a distance of 100-150 feet. Exhibit A-1. The flight nurse testified to a separation of no more than 100 yards (*id.* at 36), and his letter at the time of the incident referred to a separation of about 400 feet. Exhibit A-2.

<sup>5</sup>Radar tracking data (Exhibit A-4) show the two aircraft in a parallel course, and into the Class C airspace.

<sup>6</sup>The law judge found that respondent had operated within 400 feet of the helicopter. Tr. at 101. It is not entirely clear

the law judge's refusal to find that respondent also engaged in prohibited formation flight, violated right-of-way rules, and was reckless in his actions, rather than only careless. We agree with the Administrator, and the analysis that follows supports restoration of the 180-day suspension.

Respondent's acts were reckless ones. The law judge defined recklessness as requiring some specific intent, but we have held that it is comparable to a finding of gross negligence.

Respondent's behavior here was so egregiously insensitive to safety concerns, with no mitigating factors even being offered, that it warrants a recklessness finding. We also agree that respondent violated § 91.113(f). In his departure pass directly over the helicopter, respondent did not pass well clear.

Finally, we affirm the Administrator's § 91.111(b) claim of improper formation flying. Although we are somewhat sympathetic to the law judge's concern that there is little precedent or definition to the term, we nevertheless have no difficulty concluding in this case that § 91.111(b) was violated.<sup>7</sup> The evidence shows that, for a considerable period of time, respondent tracked the helicopter's course, at most 400 feet away, and that the helicopter pilot not only was concerned but tried, without success, to take evasive maneuvers. Close flying

(..continued)

that, in this statement, the law judge intended to reject the pilot and flight nurse statements of closer operations. As it has no effect on our decision, we will use the 400-foot figure.

<sup>7</sup>See Administrator v. Ricker, 5 NTSB 299, 301 (1985) (the rule is sufficiently clear).

such as this demands the prior arrangement required by the rules.<sup>8</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted; and
2. The 180-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.<sup>9</sup>

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

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<sup>8</sup>We disagree with the law judge's comment that 400 feet was "quite a bit of distance if you're in Mr. Krueger's position." Tr. at 101. It is not a sufficient safety margin without prior arrangement.

<sup>9</sup>For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).